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PHILOSOPHY OF LAW

Thom Brooks

Introduction

G. W. F. Hegel was neither a lawyer nor primarily a legal theorist, but his writings make a significant influence to our understanding of legal philosophy. Hegel's primary contribution is his *Philosophy of Right* although he provides us with important insights in other works, such as his *Philosophy of History* and even the *Science of Logic*. No survey of the history of legal philosophy is complete without Hegel. While there is no disputing his importance, there is disagreement about where Hegel's importance lies. Scholarly disputes range widely from the view Hegel defends a theory of freedom to a philosophy of despotism.¹ There is further debate about which view about the nature of law best fits Hegel's legal philosophy.

I argue that Hegel's philosophy of law is best understood as a natural law theory. But what is interesting about Hegel's view is that it represents a distinctive alternative to how most natural law theories are traditionally conceived. Hegel's philosophy is remarkable for providing an entirely new way of thinking about the relation between law and morality than had been considered before. It is the distinctiveness of his legal philosophy that has rendered so difficult easy categorising into standard jurisprudential schools of thought. There is little that is standard in Hegel's innovative understanding of law.

The chapter proceeds as follows. I begin with an overview of leading natural law theorists from antiquity to today. Natural law is a wide tent composed of diverse views, but virtually all endorse some view of what I call *natural law externalism*: the idea that we determine moral standards for judging legal systems outside of them. The following section argues that Hegel supports *natural law internalism*: this is the view that we assess legal systems using moral standards found within them. Our moral assessment of law is internal and not external. This represents an important divergence from the natural law tradition that Hegel pioneered. The following sections consider implications of Hegel's jurisprudence for the relation of the judiciary to the public and his often misunderstood theory of punishment.

Natural Law Externalism: Old and New

Natural law is a large tent encompassing a wide array of theoretical perspectives. They are loosely bound together by a shared conviction that law and morality are interconnected: to say something is 'law' is to say something about its morality. Despite their many differences, natural law theories also understand the relation of law and morality in a particular way, as what I call *natural law externalism*. This is the view that we understand morality *externally* from the law and use our moral standard as an external measure of legal validity. This picture of the natural law tradition holds for most classical and contemporary natural law theorists. I explain this here in order to show in the next section that Hegel's philosophy of law represents an important break from this tradition because it conceives of law and morality in a different relationship.

Classical natural law is perhaps best stated by Cicero:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from

¹ See Paul Franco, *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 2002) and Karl Popper, *The Open Society and Its Enemies*, Vol. 2: *Hegel and Marx* (London: Routledge, 2002).

wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, although neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely . . . there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reasons of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishments.²

There are five central tenets of classical natural law that we can discern from this statement.³ The first is that we can distinguish between ‘law’ and ‘true law’. This is the difference between what is merely legal and what should always be legal. For example, it may be considered merely legal in this sense that a contract can allow a specific number of work days during which it can be voided without penalty. It might be said that this is mostly a contingent matter because what is most important is the centrality of our consent to making any contract binding. Natural lawyers understand ‘true law’ as not a contingent or inessential matter, but something more perfect. Not all laws share the same status: while all laws are part of a legal system, some are more central and ideal than others.

A second tenet of classical natural law is that we can make the distinction between law and true law by using a standard of moral justice. This links with a third tenet: that law is more ‘true’ the closer it coheres with a standard of moral justice. So we can distinguish between law and true law by considering how well law satisfies a moral standard. True laws more perfectly embody moral justice and the merely legal occupy the opposite side of the spectrum. Morality is relevant for the study of law because it reveals how well the law meet standards of moral justice. Law should not be understood separately from morality and, more specifically, from a standard of moral justice.

Perhaps the greatest disagreement among classical natural lawyers concerns identifying the correct moral standard we should use in weighing up how ‘true’ our laws are. Most, if not all, follow Cicero’s comments above and identify true law as meeting some divine threshold. But where we should draw lines in confirming and applying these standards can differ virtually from one natural lawyer to the next.

A fourth central tenet of classical natural law is that the standard of moral justice is external and applied in our normative assessment of law. We are to consider first what should serve as a satisfactory standard of moral justice. Once this is identified our moral standard is to be applied to our laws to see how ‘true’, or morally just, they are. But the standard we hold the law to is external to the law. We do not look first to the law to see what moral standards may already be embedded. Instead, we consider which moral standard should the law satisfy and then apply this external to the law standard to judge how just our laws are.

A final central tenet is specific only to classical natural law theorists. It is that the ‘true’ law is universally and eternally true. So for Cicero the most just laws are applicable everywhere at all times without exception: what is a true law for Rome will be equally true

² Brian Bix, ‘Natural Law Theory’ in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 224.

³ See Thom Brooks, ‘Natural Law Internalism’ in Thom Brooks (ed.), *Hegel’s Philosophy of Right* (Oxford: Blackwell, 2012), 167—69.

for New York or New Delhi. This is the case whether we speak of the past, the present or the future: the most perfect law is perfect for every people and every age; it does not change over time.

Contemporary natural lawyers agree with many of these tenets. Specifically, they agree that a standard of moral justice should be used to consider how just our laws are. This standard should be determined first externally to the law and then applied in our assessment of the law. Contemporary natural lawyers are deeply divided over what should serve as the most satisfactory standard, but they generally agree on an important break from natural law's classical tradition. This is that contemporary theorists do not tend to link the most just with the divine. One implication is that the majority may find a particular view of morality most justified, but few claim this supports the view that there is one and only one supremely just legal system everywhere at any time.

This can be explained partly by the enlightenment forming a clear transition away from the view of all true law as divine to the idea of just laws grounded in compelling reasons. This speaks to H. L. A. Hart's definition of natural law as 'that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid'.⁴ Contemporary natural lawyers give greater weight to the use of reason in justifying the best standard of moral justice to assess the law.

For example, consider two different and influential contemporary natural law theories. The first is the natural law theory of John Finnis. His perspective is more traditional than most today. For instance, he claims that through reason we can identify seven basic forms of the human good. These include goods such as knowledge, play and sociability.⁵ Each is discoverable through our practical reflection on what basic forms of the good we might possess. These goods are understood as things worth having for a minimally decent human life. We undertake this task first before considering its legal application. Once we have identified these goods this helps us structure our moral appraisal of law: 'they lay down for us the outlines of everything one could reasonably want to do, to have, and to be'.⁶ So we determine basic forms of the good first and then apply them in assessing law.

Of course, our use of practical reasoning may lead us to consider different forms of the good from what Finnis identifies. Or we might disagree on how some forms come to serve as basic human goods. The points that I want to raise are, first, that our determining a moral standard is prior to our determining the relative moral justice of our laws and that, secondly, this standard is considered independently of the legal system we apply it to. Our moral standard is external to the law. Finnis is an example of one kind of what we might call natural law externalism, but so is Cicero's because he has a view of divine justice first that is to then be applied to law.

Now consider Lon Fuller's natural law approach as a second example of a contemporary natural lawyer whose view is compatible with natural law externalism in a different way. Fuller defends what he calls 'the inner morality of law'.⁷ The inner morality he identifies is not, perhaps confusingly, a morality that is internal to the law. Instead, Fuller engages in practical reasoning to discover eight principles that he claims any legal system

⁴ H. L. A. Hart, *The Concept of Law*, 2nd edition (Oxford: Oxford University Press, 1994), 186.

⁵ See John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 85—90.

⁶ Finnis, *Natural Law and Natural Rights*, 97.

⁷ See Lon L. Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969), 42.

ought to satisfy.⁸ These principles include the guarantee to ‘make the law known, make it coherent and clear . . . etc’.⁹ Fuller’s principles require legal systems to provide general laws that are publicly accessible and not retrospective. If any of his eight principles is not met, then Fuller says that this ‘does not simply result in a bad system of law; it results in something that is not properly called a legal system at all’.¹⁰

What Fuller calls law’s ‘inner morality’ does not, in fact, emanate and develop from within a legal system. Law’s morality is grasped externally by reason in response to circumstances. Fuller illustrates the application of morality to law with the example of our visiting a former Minister of Justice in Poland. The Minister recounts how his government endeavoured to make the law clear and well known by its citizens, but unfortunately this came at a hidden cost that making laws more understandable ‘rendered their application by the courts more capricious and less predictable’.¹¹ Fuller argues that we should balance adhering best we can to our moral principles in light of the changing circumstances that confront us. His is a project of determining these principles first and then applying them to the law as a standard for law’s moral assessment.¹²

Unsurprisingly, Fuller refers to his approach as ‘a procedural version of natural law theory’.¹³ For this reason, he can be understood to offer a more formalistic model of natural law. There is much of interest in Fuller’s approach. One attraction is that his procedural approach attempting to flesh out minimal moral conditions that any just legal system should satisfy addresses the criticism faced by many natural law views that they are too demanding because they are only satisfied when people act like angels. But two key points concern us here. One is that Fuller identifies a standard of moral justice first – that is to be applied later in a moral assessment of the law. Our moral standard for judging the justice of our laws comes prior to the laws themselves. Secondly, this standard is determined independently of our legal system.

In sum, this section provides important background about natural law theories old and new. Each accepts several tenets in common. They recognise some laws are more morally satisfactory than others. They claim this is to be determined through applying a standard of moral justice and, crucially, this standard is determined separately from the legal system to which it is applied.

My point is not to argue that the moral standards used lack any basis in real life and always a product of speculation, but rather that the standards—however realistic or compelling—are not chosen on the basis of any particular moral standard found within a legal system. Instead, moral standards are determined externally to a legal system. Law and morality may be intrinsically linked, but they are also potentially separable. Natural law theorists may have different views on which moral standard is best, but most can recognise an immoral legal system as a legal system. Laws should aspire to compatibility with justice, but they can often fall far short. They remain law either way even if some are more morally meritorious and just than others.

Hegel’s Natural Law Internalism

⁸ Fuller, *The Morality of Law*, 39—49.

⁹ Fuller, *The Morality of Law*, 42.

¹⁰ Fuller, *The Morality of Law*, 39.

¹¹ Fuller, *The Morality of Law*, 45.

¹² See Fuller, *The Morality of Law*, 33—39.

¹³ Fuller, *The Morality of Law*, 97.

The natural law tradition is a diverse camp encompassing many different perspectives. The previous section argued that both classical natural law and the leading contemporary natural law theorists share something in common: they all argue for an external understanding of morality that we then apply to our analysis of law as a standard of moral justice. There will be divergent approaches to how this shared practice is conducted. Cicero argues we must grasp ‘true reason’ that is divine in nature, Finnis claims we should identify basic forms of the human good through reason and Fuller highlights moral principles that any legal system should embody. The point is each identifies a moral standard first and then applies it to law afterwards: we discern morality externally and then analyse law in light of this standard.

This discussion is important because it underscores the distinctive break from standard natural law theorising that Hegel’s legal philosophy represents. While his views are correctly understood by most as consistent with natural law, the precise connection between Hegel’s views and the standard natural law tradition is overlooked or unnoticed: for most scholars, Hegel endorses natural law theory in an undistinctive way.¹⁴ But this conclusion is a mistake.

The view that Hegel is an undistinctive natural lawyer is not shared by all commentators. Hegel’s legal philosophy has thought to belong to jurisprudential schools as diverse as the historical school of jurisprudence, Marxist legal theory, postmodern critical theory and transcendental idealist legal theory.¹⁵ This wide disparity of opinion is unique to Hegel. There is no similar disagreement about any other significant legal philosopher.

This disagreement arises from the fact that Hegel’s legal philosophy does not fit traditional jurisprudential moulds. This is because it defends a novel understanding about the relation of law and morality that has gone unnoticed. In short, Hegel offers what I will call a view of natural law *internalism*.¹⁶ All natural law theorists claim law and morality are linked, but while traditional natural law theorists first determine moral standards to then be applied in an assessment of law, the natural law internalism of Hegel assesses law through moral standards arising within the law itself. This section presents why Hegel’s legal theory should be located with the natural law tradition—and why it provides us with an innovative

¹⁴ See Harry Brod, *Hegel’s Philosophy of Politics: Idealism, Identity and Modernity* (Boulder, CO: Westview, 1992), 38, 79; Tony Burns, *Natural Law and Political Ideology in the Philosophy of Hegel* (Aldershot: Avebury, 1996); Dudley Knowles, *Hegel and the Philosophy of Right* (London: Routledge, 2002), 128; George Whitecross Paton, *A Textbook of Jurisprudence*, 4th ed. (Oxford: Clarendon, 1972), 114—15; Terry Pinkard, ‘Constitutionalism, Politics and the Common Life’ in H. Tristram Engelhardt, Jr. and Terry Pinkard (eds), *Hegel Reconsidered: Beyond Metaphysics and the Authoritarian State* (Dordrecht: Kluwer, 1994), 177; H. A. Rommen, ‘In Defense of Natural Law’ in Sidney Hook (ed.), *Law and Philosophy* (New York: New York University Press, 1964), 116; Kevin Thompson, ‘Institutional Normativity’ in Robert R. Williams (ed.), *Beyond Liberalism and Communitarianism* (Albany: State University of New York Press, 2001), 42 and Ernest J. Weinrib, ‘Legal Formalism’ in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 338.

¹⁵ See Thom Brooks, ‘Hegel’s Ambiguous Contribution to Legal Theory’, *Res Publica* 11 (2005), 85—94; L. B. Curzon, *Jurisprudence*, 3d ed. (London: Cavendish, 1996), 179, 212; Giorgio del Vecchio, *Philosophy of Law*, 8th ed. (Washington, DC: Catholic University of America Press, 1952), 123, 125—29; R. W. M. Dias, *Jurisprudence*, 5th ed. (London: Butterworths, 1985), 384—85; Costas Douzinas, ‘Identity, Recognition, Rights or What can Hegel Teach Us about Human Rights?’ *Journal of Law and Society* 29 (2002), 379—405; M. D. A. Freeman (ed.), *Lloyd’s Introduction to Jurisprudence*, 6th ed. (London: Sweet and Maxwell, 1994), 783—85; Michael H. Hoffheimer, ‘Hegel’s First Philosophy of Law’, *Tennessee Law Review* 62 (1995), 823—74; Paton, *A Textbook of Jurisprudence*, 114—15 and Michael Salter and Julia A. Shaw, ‘Towards a Critical Theory of Constitutional Law: Hegel’s Contribution’, *Journal of Law and Society* 21 (1994), 464—86.

¹⁶ See Thom Brooks, *Punishment* (New York: Routledge, 2012), 225; Thom Brooks, ‘Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory’, *Georgia State University Law Review* 23 (2007), 513—60 and Brooks, ‘Natural Law Internalism’, 167—79.

understanding of how law and morality should relate that offers a distinctive break from other natural law theorists.

Hegel accepts a core tenet of natural law about law and morality. He argues: ‘To the Ideal of Freedom, Law and Morality are indispensably requisite’ (*PH*, 41). Law and morality are not independent of each other, but instead interdependent. This puts Hegel clearly at odds with positivists who claim our study of law is about rules where morality may play no part.¹⁷

Like many traditional views of natural law, Hegel believes that law becomes more substantiated—or ‘true’ or ‘actual’—when it better satisfies a moral standard by embodying a specific form of normativity. Some laws are more valid and authoritative the greater they cohere with this moral standard. Hegel says that ‘what is law [*Geist*] may differ in content from what is right in itself [*an sich Recht*]’ (*PR*, §212). So what is lawful might not be rightful. Slavery is an example of this. For Hegel, slavery is *both* legal *and* unjust (*LNR*, §8R; *PH*, 99). Laws become less unjust the more they achieve a ‘realization’ (*Verwirklichung*) of ‘Right’ (*Recht*) whereby the law better embodies justice (*PM*, §529).

Hegel’s discussion of law plays on an ambiguity in his native German language using both *Recht* and *Gesetz*. Both words can be translated as ‘law’, but Hegel uses them in specific ways. He refers to law or a statute as *Gesetz* and reserves *Recht* for true law, or justice. Their difference is that only the latter is commensurate with justice. All other forms of positive laws (*Gesetz*) embody lesser forms of justice (*Recht*). They come together in the following way, Hegel says: ‘actual legal relationships presuppose laws founded on right [*Rechtsgesetz*] as something valid in and for itself’ (*LNR*, §109). The recognition of a law is to assume it embodies some measure of justice. We do not then presume our laws are inherently unjust. But it is a widely held concern that where laws are found to fall short of some compelling moral standard this requires laws to be changed or terminated.¹⁸ The discovery of unjust laws compels us towards making revisions so that our legal system moves closer towards justice.

Hegel argues that our understanding of law must start from the law itself. He says that ‘what is *legal* [*gesetzmäßig*] is . . . the source of cognition of what is *right* [*Recht*], or more precisely, of what is *lawful* [*Rechters*]’. So we are not to begin our appraisal—moral or otherwise—of the law until we first have an understanding about the law. We should discern what is right from the raw material that is the law itself: in other words, justice springs forth from the law. Our normative assessment of law develops from within the law internally: what is right (*Recht*) is instantiated from within what is lawful (*Rechters*) (*PR*, §3). Hegel says: ‘Law is part of the existing state of things, with Spirit implicit in it’ (*PH*, 268). The law is not separable from its spirit. Our understanding of the law is therefore grounded in doctrine: it must be an account of ‘the present and the actual, not the setting up of a world beyond which exists God knows where’ (*PR*, 20). Hegel sees his view of natural law as embedded in our practices.

Hegel’s natural law internalism occupies an interesting, and even novel, jurisprudential space. Like legal positivists, his focus is on the law itself. Hegel does not

¹⁷ See Hart, *The Concept of Law* and Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 2003).

¹⁸ This is a widely held view among the general public, but it is not commonly shared by most legal philosophers. While natural lawyers traditionally have dominated jurisprudence, legal positivism and legal realism are more popular among contemporary legal philosophers. This is not to say positivists and realists are unconcerned about injustice, but rather to draw attention to the fact that they share a different view about the importance and the place of morality in studying law.

argue for assessing the law according to some standard that is outside and so external to the law. Hegel's legal theory accepts natural law's commitment to claiming that our understanding of law is intrinsically bound with our normative assessment of law. But we can now see that Hegel's legal theory represents a distinctive break from this tradition insofar as only Hegel claims the normative standard for assessing law is to be found within the law itself.

Hegel similarly understands legal development as an *internal* process. Robert Stern captures well how this should be considered:

we can use here an "internal" notion of rationality, whereby it is rational to change from one outlook or theory to another *not* because the latter possesses the transcendental predicate of "truth" or "absolute validity," but rather because it represents a resolution of the problems, incoherences, anomalies, inconsistencies and limitations of the *previous* scheme or theory, and so constitutes an advance on it, in relative, but not absolute terms.¹⁹

This passage recommends a view about internal progress that speaks to Hegel's idea of law's immanent development over time. This legal progress is perhaps best understood as a series of resolutions, or inconsistencies and anomalies within the law. So the law does not simply 'develop' *per se*, but develops through overcoming its own incoherencies. Hegel recognises that the law might instead appear to us as little more than 'a collection without principle, whose inconsistencies and confusion require the most acute perception to rescue it as far as possible from its contradictions'.²⁰ The law can look this way because of the contingencies about how it is forged. A state's legislation is rarely a seamless, coherent expression of a particular moral perspective. Instead, it is more commonly a product of political compromises peppered with statements about judicial doctrine and the rule of law from the judiciary's case law. These sources of law can sometimes be in tension, such as where an appointed judiciary finds unconstitutional—and so unlawful—legislation passed by elected representatives. Famous cases abound, such as *Brown v. Board of Education* ending segregation of American students based on their ethnicity.²¹

The law resolves its own tensions and incoherencies arising from the law's contingent existence through particular statutes, secondary legislation or authoritative case law. The law does this from within its own resources (*PR*, §216). Hegel says:

the progress from that which forms the beginning is to be regarded as only a further determination of it, hence that which forms the starting point of the development *remains* at the base of all that follows and does not vanish from it (*SL*, 71).

The kind of progress that Hegel has in mind here is a progressive comprehension. In this case, our focus is a progressive comprehension of law. Our comprehension develops from within the law's own normative content (*PR*, §31). Its beginning does not 'vanish', but our understanding of it does as we develop clearer insights into law's normative content.

Law's internal development is a dynamic process. Hegel says that 'the scope of the law [*Gesetz*] ought on the one hand to be that of a complete and self-contained whole, but on

¹⁹ Robert Stern, 'MacIntyre and Historicism' in John Horton and Susan Mendus (eds), *After MacIntyre: Critical Perspectives on the World of Alasdair MacIntyre* (Cambridge: Polity, 1994), 151.

²⁰ G. W. F. Hegel, 'The German Constitution' in *Political Writings*, eds. Laurence Dickey and H. B. Nisbet (Cambridge: Cambridge University Press, 1999), 11).

²¹ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

the other hand, there is a constant need for new legal determinations [*gesetzlicher Bestimmungen*]’ (PR, §216, see §3R). In other words, the legal system is ‘complete’ insofar as a progressive understanding of its normativity need not warrant there be more laws imposed from outside itself. The law has all the resources it requires at the beginning for internal moral development. To grasp what shape this should take requires our looking more carefully at the laws we already have and not looking beyond to norms or laws we want to find.

Hegel clarifies these points further:

an advance of the analytic intellect, which discovers new distinctions, which again make new decisions necessary. To provisions of this sort one may give the name of *new* decisions or *new* laws [*Gesetze*]; but in proportion to the graduate advance in specialization the interest and value of these provisions declines. They fall within the already subsisting “substantial,” general laws, like improvements on a floor or a door, within the house – which though something *new*, are not a new *house* (PM, §529).

Hegel’s point is that as we solve internal incoherencies within the law according to its normativity and not from some external source we be mistaken into thinking we have created *new* laws. This view is mistaken because we are not creating new laws, but newly discovering what is already lawful – the law’s previously unrecognised content. Hegel views the law as a seamless web. When we better articulate the law’s internal normative content, our understanding of law becomes richer as these determinations are made explicit. The law progresses through resolving internal conflicts and by filling apparent gaps.

Law progresses towards justice. Hegel says that justice has its ‘existence [*Dasein*] in the form of law [*Gesetzes*]’ and not ‘particular volitions and opinions’ (PR, §219). Law develops into justice through our ‘cognition of what is *right* [*Recht*], or more precisely, of what is *lawful* [*Rechters*]’ (PR, §212R). We fill gaps and overcome incoherencies through codification. Hegel assumes that no political community will construct a timeless, unproblematic legal system on its first attempt. Legal codes are everywhere incomplete although some are less finished than others (PR, §211R).

A community’s development of law is ‘the work of centuries’ not to be completed overnight (PR, §274A). Our progressing our understanding of law towards justice is ‘a perennial approximation to perfection [*Vollkommenheit das Perennieren der Annäherung*]’ we may never achieve fully (PR, §216R). Hegel does not claim there is any one set of laws or legal system that is everywhere ideal at all times. Philosophy, for Hegel, is ‘a peculiar mode of thinking’ examining ‘what is there before us’ (EL, §2; SL, 69). Philosophy allows us to better understand our past and gain insight into our present, but it is fundamentally historical: every individual is a ‘child of his time’ and ‘philosophy, too, is its own time comprehended in thoughts’ (PR, 21). Any philosophical assessment is provisional and open to future revision over time.²²

Justice in Robes?

Hegel’s understanding of natural law as a form of natural law internalism is a break from natural law’s traditional externalism. But is Hegel’s internalism preferable?

²² See Thom Brooks, ‘History’ in *Hegel’s Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2nd edition (Edinburgh: Edinburgh University Press, 2013), 148—57.

Natural law externalist theories expose themselves to the charge that they seek to impose a moral standard in determining law's validity, but their standards stand in need of further justification. This presents natural law externalism with two problems. The first is the need to justify that moral standards should determine legal validity. It might be countered that laws are valid if approved through agreed procedures, but we can have unjust laws as valid laws. So what should serve as the appropriate moral standard? Natural lawyers are deeply divided over which is the most compelling. For example, Cicero might claim consistency with God's commands, Finnis favours compatibility of basic forms of human goods and Fuller endorses our satisfying a threshold of his inner morality of law test to name but three different types of external, moral standards.

The problem is not only that each natural lawyer may well defend either different moral standards or apply these standards differently, but more centrally that each understands the study of law through moral philosophy. This is a problem because there may be practical limits to how far moral philosophy can and should go in our working out a legal system that is just. One example is Immanuel Kant's well-known division in his *The Metaphysics of Morals* between the doctrine of right where morality is relevant for forging and maintaining political and legal institutions and the doctrine of virtue where institutions become irrelevant.²³ So even if we could agree a moral standard, there might be limits to its application in a legal system. But our focus remains on getting the moral philosophy right first: law might appear to almost get in the way of our enacting a preferred moral vision.

Hegel's natural law internalism rejects this approach. While he accepts that legal philosophy is about justice, the law is not an obstacle for achieving justice but instead the necessary instrument through which justice can be forged. The central focus of Hegel's distinctive natural law theory is on the law itself as we try to grasp its own internal morality and foster it. So Hegel's theory avoids the problem of our being divided over which moral standard is best before we come to first consider the justice of a legal system. Hegel's concern is with making the law pure, not trying to work law into a purer image derived from outside it.

However, Hegel's avoiding this problem exposes him to another. This is the risk of misidentifying the 'right' (*Recht*) within a legal system. If law is to be morally developed from within, this requires our being able to correctly discern its inner morality. But we must do so in the absence of an independent criterion to avoid only 'finding' in the law what we were looking for in advance.

This point can be illustrated by considering this process in practice. For Hegel, our knowledge about justice must focus on identifying 'right' (*Recht*) and not our mere personal convictions. This is because following our personal convictions causes our understanding of right to become tainted (*PR*, §309). No one person's conviction of justice should prevail as we move towards a more communitarian, mutual recognition of the concept of right and its practical application in law (*PR*, §§144, 260). This entails that judges should ensure that their personal views should not interfere with the content of their legal decision-making for fear that their decisions would be rendered 'arbitrary' (*Willkür*) (*PR*, §211A). So courts should attempt to comprehend justice 'in the particular case, without subjective feeling [*Empfindung*] of particular interest' (*PR*, §219).

²³ See Immanuel Kant, *The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996).

The issue is that there is no guarantee that our understanding of law accurately captures some important part of its internal morality waiting to be discovered rather than conjured from our imagination. Natural law internalism may represent a new understanding of natural law jurisprudence, but it suffers from an epistemological problem concerning our ability to identify correctly justice within the law.

This simple illustration of the obstacles any judge has in identifying the internal morality of law helps make the point about the problem Hegel's theory runs into, but it is inaccurate in an important respect. Hegel gives the public a key role in the administration of justice within the state. He held this view throughout his career and it can be found in his early writings as well:

How blind are those who like to believe that institutions, constitutions and laws which no longer accord with men's customs, needs, opinions and from which the spirit has departed, can continue to exist, or that forms in which feeling and understanding no longer have an interest are powerful enough to furnish a lasting bond for a nation [*eines Volkes*] (NL, 2).

Our political and legal institutions lose some share of their moral legitimacy where they fail to accord with the community's shared convictions about public justice. This legitimacy is not majoritarian, but has an 'organic quality' (PR, §302, R). It is key that any legal system is accessible to the public, but without the requirement of a majority vote.²⁴

This view of the public and public justice are at the heart of Hegel's defence of the jury trial.²⁵ He says:

knowledge [*Kenntnis*] of right and of the course of court proceedings, as well as the ability to pursue one's rights, may become the *property* of a class [*Stand*] which makes itself exclusive . . . by the terminology it uses, inasmuch as this terminology is a foreign language for those whose rights are at stake (PR, §228R).

Juries are important because they help ensure that individuals on trial are reasonably capable of understanding the proceedings and verdict. A defendant may well disagree with a jury's decision, but he or she should be able to have some inkling about how the jury came to their view in the trial. This is because the defendant is much like his peers serving on the jury. The alternative is to leave the decision exclusively in the hands of the trained judge. Hegel finds this problematic because it can run the risk that the proceedings and verdict may be conducted in a way that is inaccessible to a defendant, especially one that lacks a legal background. In that case, legal justice would become disconnected from the community it serves. It is through letting the public decide judicial outcomes through the jury trial that the link between the community and its legal system are maintained.

²⁴ This raises some interesting parallels with Jean-Jacques Rousseau's political and legal philosophy. Rousseau was similarly concerned that true freedom – understood as the General Will – shaped the development of our laws and political institutions rather than arbitrary decisions. The General Will is a similar core connection between citizens in a political community that work out in a deliberative way their shared view of justice. This is subject to constant revision over time. While Rousseau's thought is very different from Hegel's, it is likely these ideas had some influence on Hegel's thinking given his knowledge of and interest in Rousseau's writings. See Thom Brooks (ed.), *Rousseau and Law* (Aldershot: Ashgate, 2005).

²⁵ See Thom Brooks, 'The Right to Trial by Jury', *Journal of Applied Philosophy* 21 (2004): 197–212 and Thom Brooks (ed.), *The Right to a Fair Trial* (Aldershot: Ashgate, 2009).

Nonetheless, letting juries determine outcomes may secure this link, but maintaining a connection between the public and their legal system is not necessarily the same as correctly identifying the morality internal to a legal system that should help guide how decisions should be made. My concern is that the two can easily come apart: the community's pursuit of its own sense of right may move in different directions than a pursuit following a view of right determined from careful examination of existing laws. Hegel seems to believe the two work in tandem, but this is unclear. Nor is it obvious that the community's pursuit of its sense of justice is coherent, or that the current legal system of any state has within it a discoverable and coherent internal morality.

Throughout his writings, Hegel was deeply critical of England's common law tradition. Hegel argues that a people's 'customary rights' will at first 'be characterised by *formlessness*, indeterminacy and incompleteness' when they are initially collected and set out in a legal code (*PR*, §211R). But then this legal code should progressively self-develop by making itself more explicit through codification. And yet England's common law 'is contained, as everyone knows' in an unwritten form: this is the cause of 'enormous confusion which prevails in England' as 'judges constantly act as *legislators*' (*PR*, §211R). This is because it is they that help set out what the law permits in particular cases.

But it is unclear how strongly Hegel should criticise the common law system – notwithstanding his explicit rejection of it. This is because his argument for trial by jury – which originated in common law jurisdictions – supports the flexibility of the people giving expression to their sense of right. Hegel claims the law is living and evolving as it develops a conception of actualised right – it is not fixed or set in stone and so more fluid than the codified Roman law system prevalent in Germany then as now. Hegel cannot both defend the case-by-case working out of right performed by jury trials while rejecting the case-by-case establishment of legal precedents by judges because the latter 'retain a certain particularity' (*PR*, §211A).²⁶ If working out how right can be understood concretely subject to revision and constant testing is how a people develop a more determinate sense of right, it is unclear why the common law cannot be used to achieve this end.

Hegel is also critical about the common law's adversarial system. Here he is on more solid ground. Hegel says: 'In the English legal system, it is left to the insight or arbitrary will of the prosecutor to categorise an act in terms of its specific criminal character (e.g. as murder or manslaughter), and the court cannot determine otherwise if it finds his conclusion incorrect' (*PR*, §225R). In the adversarial system, prosecutors on behalf of the state determine which crime a defendant will be prosecuted for. They may be in error – and they might also engage in some brinkmanship prosecuting someone for a lesser charge that might be more certain to lead to a conviction. This is different from the German system of Hegel's time where judges would lead courtroom deliberations and not lawyers for either side without engaging in plea bargaining. This criticism does seem consistent with Hegel's legal

²⁶ Part of Hegel's concern with common law trials is their creating case law. He appears to favour working out a legal system through a legislative process than through the courts. This might be explained by his 19th Century German view of the judiciary as a part of the executive branch: both the police and the judge applies universal laws to particular cases. A concern for Hegel is that he does not appear to accept that the finding in one case can be applied to another when determining justice. Instead, he seems to hold that we should remain transfixed on right [*Recht*] and not become distracted by how it may be thought established in particular cases. But this seems untenable for Hegel because common law precedents hold as *ratio* – what counts is not the particular facts *per se*, but the legal principles and distinctions that are worked out by courts overtime and subject to constant revision. This again suggests that Hegel's stated opposition to English common law is perhaps misplaced – or at least underdeveloped. I am grateful to a graduate student in Dean Moyar's graduate class on Hegel's *Philosophy of Right* when I was a guest speaker for raising this illuminating issue.

theorising because our goal is to determine what is right and not easier or more efficient paths to finding others guilty of offences – especially where they might actually have committed a more serious, but more difficult to prove, offence

In sum, Hegel defends a novel understanding of natural law that appears to avoid the problem of disagreement about which moral standard should be determined first and then applied to our normative appraisal of law as common with natural law externalism. However, Hegel appears to trade one problem for another. This is because natural law internalism lacks any guarantee that what we claim is law's internal morality is not our 'finding' a moral standard we had been looking for.²⁷

Moreover, Hegel claims our discovering law's internal morality is a decision that juries are well-placed to make because the determination of the application of justice in a particular case is their public conception of justice. It is unclear that the community's moral standard must be the same as law's internal morality. If it were so, then we might discover law's internal morality by looking more closely within ourselves without need of looking within the law. This would render natural law internalism unstable, but we should recall that legal philosophy was not a major preoccupation for Hegel despite his importance for the field. Hegel's philosophical outline and associated lectures may not illuminate some clear way out of this problem, but he does provide us with a new way of thinking about natural law and how the public can and should relate to justice.

The Unified Theory of Punishment

Perhaps Hegel's most significant and yet overlooked achievement is his identifying what we might call *the unified theory of punishment*.²⁸ In short, the unified theory is the view that punishment is neither retributive, a deterrent or rehabilitative; but, instead, it should be understood as bringing these different facets together. Thus punishment should not be seen as one or the other, but some combination of all three. This section explains what is distinctive about Hegel's theory of punishment as a further example about the innovativeness of his legal philosophy more generally.

Philosophers typically defend one of the three main theories of punishment: retribution, deterrence and rehabilitation. Retribution is the most popular of the three. It is generally understood as the view that offenders should be punished to the degree that they deserve for some immoral activity. Murderers should be punished severely according to retributivists because they deserve it on account of their moral responsibility for such an evil act and in proportion to the wrongfulness of their crime.

Retributivists have traditionally accepted a 'principle of equality' whereby an offender's punishment is proportionate to the corresponding crime.²⁹ This principle does not necessarily entail an eye for an eye although some retributivists make statements in that direction.³⁰ Instead, it is usually a claim about comparative values: that the value of the

²⁷ I have elsewhere argued that Hegel uniquely shares some core similarities with Dworkin's legal theory. Both apply a self-developing moral standard arising from within a community's shared sense of justice and right – they are both examples of natural law internalists. See Thom Brooks, 'Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory', *Georgia State University Law Review* 23 (2007): 513–60.

²⁸ See Thom Brooks, 'Hegel and the Unified Theory of Punishment' in Thom Brooks (ed.), *Hegel's Philosophy of Right* (Oxford: Blackwell, 2012): 105–23.

²⁹ This phrase is taken from Kant. See Kant, *Metaphysics of Morals*, 6:332.

³⁰ See Kant, *Metaphysics of Morals*, 6:332: 'whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal

criminal wrong should be proportionally equivalent to the severity of punishment. For example, if someone has performed an especially grave crime like murder, punishing it with an equality of value need not require the death penalty although that is one possibility. But what is key – for the retribution as equivalence of value view – is that capital punishment would be justified not as an eye for an eye, but punishing a very serious crime with a very serious punishment. That murderers would be punished by death is more a coincidence than a requirement.³¹

Hegel is widely thought to support retributivism.³² This common interpretation is not without some support in the *Philosophy of Right*. Hegel says that crime should be understood as an infringement of ‘the existence [*Dasein*] of freedom in its *concrete* sense – i.e. to infringe right as right’ (*PR*, §95, R). It is the infringement of right, of justice, that is wrongful about crime. This requires a ‘restoration of right’ through punishment to reassert right’s existence and confirm its importance (*PR*, §99). Hegel calls this ‘*retribution*’ with the important qualification of ‘in so far as [retribution], by its concept, is an infringement of an infringement’ (*PR*, §101). This means that crime is a violation of right because it attempts to negate it. In response, we should negate this negation: a crime is an attempt to violate our rights and so punishment is an effort to undo this wrongful activity. Punishment is not be a specific equality of like for like, but ‘an approximate fulfilment’ in value (*PR*, §101R).

But this view of Hegel as a retributivist is flawed. One reason is that retribution presumes an account of moral responsibility and a legal system. We punish offenders because they have broken a law. However, Hegel’s discussion here is in the section ‘Abstract Right’ which is philosophically prior to the state and legal system. His claims about restoring right are specifically addressing the contractual stipulations arising through mutual recognition between self and other, not the more complex legal relationships citizens develop over time in the state. There is no law, no police, no courts and no prisons at this point in his discussion. This is not to say his claims about crime as a violation of right where punishment aims to restore rights is meaningless. It is rather a foundation claim about the ground of punishment that helps structure his more complete theory of punishment that develops beyond ‘Abstract Right’.

There are already strong indications that Hegel’s theory of punishment departs from standard accounts of retribution even in ‘Abstract Right’. When discussing ‘*retribution*’ with the important qualification already flagged above that by this he means ‘an infringement of an infringement’ understood as a restoration of rights, Hegel says: ‘It is not the crimes or punishments which change, but the relation between the two’ (*PR*, §96A).

This is crucial because retributivists generally accept a fixed relation between crime and punishment: the moral wrongness of one is linked to the other and this is a relationship that should not change if background conditions were different. Typically, retributivists like Kant were opposed to consequentialism and so context should not factor into which

from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself”. See Thom Brooks, ‘Kant’s Theory of Punishment’, *Utilitas* 15 (2003): 206–24.

³¹ I am grateful to Brian O’Connor for first highlighting this distinction to me.

³² David E. Cooper, ‘Hegel’s Theory of Punishment’ in Z. A. Pelczynski (ed.), *Hegel’s Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971); J. N. Findlay, *Hegel: A Re-examination* (London: George Allen & Unwin, 1958): 312–13; M. J. Inwood, *A Hegel Dictionary* (Oxford: Blackwell, 1992): 232–35; Igor Primoratz, *Justifying Legal Punishment* (Atlantic Highlands, NJ: Humanities Press, 1989): 69–81; Peter G. Stillman, ‘Hegel’s Idea of Punishment’, *Journal of the History of Philosophy* 14 (1976): 1976 and Allen W. Wood, *Hegel’s Ethical Thought* (Cambridge: Cambridge University Press, 1990: 108–24.

punishment an offender deserves. But Hegel's first break with retributivists is he accepts that context matters. Crimes may be public wrongs irrespective of circumstances, but they can make a difference into determining punishment.

Hegel's second break with retributivists is more explicit: he rejects the idea that punishment is no more than retribution. In a rarely quoted passage from his *Science of Logic*, he says:

Punishment, for example, has various determinations: it is retributive, a deterrent example as well, a threat used by the law as a deterrent, and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the *ground of punishment*, because each is an essential determination, and therefore the others, as distinct from it, are determined as merely contingent relatively to it. *But the one which is taken as ground is still not the whole punishment itself* (SL, 465).

These comments are crucial to understanding Hegel's theory of punishment.³³ They make clear that he does not believe we must choose to defend retributivism, deterrence or rehabilitation. Instead, each is a part of what punishment is about. The ground of punishment is retributivist insofar as an offender must deserve punishment for it to be justified. But the purpose of punishment as a restoration of right can take different forms, including as a deterrent or rehabilitative project, if that serves that aim.

This passage is also not the only place where Hegel makes such remarks. In his *Natural Law* essay, he argues:

in the case of punishment, one specific aspect is singled out – the criminal's moral reform, or the damage done, or the effect of his punishment on others, or the criminal's own notion of the punishment before he committed the crime, or the necessity of making this notion a reality by carrying out the threat, etc. And then some such single aspect is made the purpose and essence of the whole. The natural consequence is that, since such a specific aspect has no necessary connection with the other specific aspects which can be found and distinguished, there arises an endless struggle to find the necessary bearing and predominance of one over the others (NL, 60).

This is a critique of our taking only one particular aspect about punishment as the punishment to the exclusion of others. Punishment is not one instead of another. Nonetheless, this thought is not obvious because different theories about punishment appear to clash at first glance. What an offender deserves may justify a very different punishment from what might best deter, for example.

This leaves open the question about how punishment might bring together retribution, deterrence and rehabilitation into a unified, coherent theory. While his comments indicate this

³³ Philosophers who want to deny the importance of this passage must either argue the *Philosophy of Right*'s discussion of punishment is incompatible with this explicit example from the *Science of Logic* – a text which Hegel clearly states several times informs and underpins the arguments of the *Philosophy of Right* – or that Hegel's example in the *Science of Logic* is inconsistent with his theorising on grounds (and so must be incompatible with the *Philosophy of Right* on grounds of an false illustration of his *Logic*). It continues to surprise me that no other interpreter has picked up on this important passage, or even acknowledged it. I continue to be highly suspicious of counterarguments about Hegel's theory of punishment claiming it is some version of retributivism where they fail to acknowledge passages like this that so explicitly state that was not his view.

is his position, he is less clear about the specific shape this should take. This is perhaps partly due to the fact his comments on punishment are almost entirely in outline and require fleshing out.

Hegel leaves us some important clues. In the *Philosophy of Right*, he says:

an injury to *one* member of society is an injury to *all* the others does not alter the nature of crime in terms of its concept, but in terms of its outward existence . . . its *danger to civil society* is a determination of its magnitude . . . This quality or magnitude varies, however, according to the *condition* of civil society (*PR*, §218R).

The nature of crime at a conceptual is unchanged under different circumstances. In other words, murder and theft remain wrongful because they violate right and this is unaffected by context. It is in this sense that the ground is retributivist: all crimes are varieties of wrong at their heart.

But context matters for setting the relationship between crime and punishment. Hegel is explicit: 'it is not the crimes or punishments themselves which change, but the relation between the two' (*PR*, §96A). For example, the more that civil society is threatened by crime, the more severely it will seek to punish it. So for Hegel crimes can be punished more or less severely over time because they are seen as more or less of a threat to society. Examples he gives includes times of war or civil unrest (*PR*, §218A). Crimes will be punished less severely during peace time than during a war not because the crime is conceptually different, but because we require a greater effort at restoring rights at such a time of conflict. Indeed, Hegel argues that as a state becomes more secure we should expect the death penalty to 'become less frequent, as indeed this ultimate form of punishment deserves to be' (*PR*, §100A).

The important point is that this is no retributivist view: context can greatly influence penal severity with circumstances influencing how problematic crimes are for society. Our individual desert for some action in the past might inform whether we have committed an offence. But it does not – by itself alone – determine how we should be punished. This is starkly different from traditional retributivist views whereby it matters only what someone deserves when punishing him, not whether it makes a society happier or more secure. Yet for Hegel the stability of society and its sense of self is a key factor in setting the severity – and perhaps even setting the criminal law.³⁴

This leaves much to the imagination about how retribution, deterrence and rehabilitation might work together to act as a restoration of rights. There is some indication offered by the British Idealists, sometimes called the British Hegelians. These figures like T. H. Green, F. H. Bradley and others were heavily influenced by Hegel's philosophy and most defend a similar view of punishment where retributivist, deterrent and rehabilitative features are combined into a unified theory of punishment. This may not be an accidental coincidence given the strong influence of Hegel's philosophy, not least his *Logic*, on their work.

³⁴ If society felt no threat by the performance of certain actions, then what might have once been crimes might begin to lose their criminal character. For example, witchcraft might have been seen as a serious threat to the community and punished accordingly. But where it loses that character, its punishment evaporates until there may be no reason to think it a crime as it would not warrant punishment.

The British Idealists help us spell out a bit more how a unified theory of punishment might work.³⁵ The Idealist T. H. Green says: ‘the justice of the punishment depends on the justice of the general system of rights’ and ‘the proper and direct object of state-punishment [is] . . . the general protection of rights’ (1941: §§189, 204).³⁶ Punishment is about societal maintenance through the protection of rights. Crimes are rights violations that threaten the community and require a response to restore the public recognition of rights possessed by individuals.

This is spelled out further by the Idealist James Seth:

This view of the object of punishment gives the true measure of its amount. This is found not in the amount of moral depravity which the crime reveals, but in the importance of the right violated, relatively to the system of rights of which it forms a part . . . The measure of the punishment is, in short, the measure of social necessity; and this measure is a changing one (1907: 305).³⁷

We punish crimes because they are violations of our rights, and these rights should be restored through punishment. All crimes are rights violations, but some rights are more central than others and so require more punishment. Theft may violate my property rights and murder my right to life, but murder is more significant because violating this right ends any possibility of my enjoying this or any other right.

These perspectives flesh out a bit more what a unified theory of punishment might look like. Punishment must be deserved and its amount would vary depending on what would be required to maintain and protect a system of rights. This could warrant more deterrent punishments in some circumstances and more rehabilitative elements in others. Any clash between competing principles is governed by an overarching purpose of rights protection.

This still leaves much more to be worked out and does not speak directly to individual cases. But it should be clear that Hegel has once again done something remarkable. He has offered us new insights into the nature of punishment and the possibility of a novel alternative, the unified theory of punishment.

Conclusion

This chapter has provided a survey of some key ideas in Hegel’s philosophy of law. There is some debate about which jurisprudential school of thought best relates to his legal theory although most commentators view it as an unexceptional natural law theory. But this is untrue. Hegel’s uniquely creates a new distinction in the natural law tradition between natural law externalism and natural law internalism. The former represents most natural lawyers and it is the view that we are to determine a moral standard first and then apply it to the law to assess its overall justice. Hegel defends the latter and claims the moral standard we should

³⁵ See Thom Brooks, ‘Punishment and British Idealism’ in Jesper Ryberg and J. Angelo Corlett (eds), *Punishment and Ethics: New Perspectives* (Basingstoke: Palgrave Macmillan, 2010): 16—32; Thom Brooks, ‘Is Bradley a Retributivist?’ *History of Political Thought* 32 (2011): 83—95 and Thom Brooks, ‘On F. H. Bradley’s “Some Remarks on Punishment”’, *Ethics* 125 (2014): 223—25.

³⁶ T. H. Green, *Lectures on the Principles of Political Obligation* (London: Longmans, Green, 1941): §§189, 204.

³⁷ See Thom Brooks, ‘James Seth on Natural Law and Legal Theory’, *Collingwood and British Idealism Studies* 12 (2012): 115—32.

use to assess the justice of a legal system is located internally to it. We look to the law first and ascertain its moral development from within.

This perspective is not without its problems. It is unclear how we can be sure that the moral standards we discover are not read into our interpretation of law's internal morality from outside. Nor is it clear how Hegel's clear support for the public having a say on matters of public justice such as through the jury trial can perform the task of developing the internal morality of law. But Hegel nonetheless provides us with a new understanding of the natural law tradition that has escaped his predecessors and offers an important, and to my mind convincing, defence of the jury trial.

Hegel presents us with an innovative theory of punishment. Instead of the traditional view that penal theorists must choose between defending retribution, deterrence or rehabilitation, Hegel claims punishment is not one of them but all in combination. This opens his claim to the charge that these different theories clash with each other. But the key to unlocking this problem that was uncovered by the British Idealists inspired by Hegel's work in the late 19th Century was that these three can be brought together under a new framework of societal maintenance through rights protection—an analysis that is consistent with Hegel's comments about punishment across his work. This has real contemporary importance because countries like the United States and United Kingdom use sentencing guidelines that bring together retributivist, deterrent and rehabilitative elements without a framework for employing them coherently. Hegel is the first to substantively contribute to the idea of the unified theory of punishment and it offers a promising perspective for rendering more coherent the sentencing guidelines in force throughout many countries today.

Overall, these are remarkable achievements for a philosopher who was not trained in law and did not set out to be a philosopher of law *per se*. Hegel's work continues to inspire us with its rich insights into how we can better understand past thinking about key issues that still reap rewards for us today.³⁸

BIBLIOGRAPHY

Bix, Brian (1996). 'Natural Law Theory' in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*. Oxford: Blackwell, pp. 223—40.

Brod, Harry (1992). *Hegel's Philosophy of Politics: Idealism, Identity and Modernity*. Boulder, CO: Westview.

Brooks, Thom (2003). 'Kant's Theory of Punishment', *Utilitas* 15: 206—24.

Brooks, Thom (2003). 'T. H. Green's Theory of Punishment', *History of Political Thought* 24: 685—701.

Brooks, Thom (2004). 'The Right to Trial by Jury', *Journal of Applied Philosophy* 21: 197—212.

³⁸ I am very grateful for comments by Dean Moyar and from students in his graduate seminar studying Hegel's *Philosophy of Rights*. I further benefitted from discussions about Hegel's legal theory with Chris Bennett, John Gardner, Stephen Houlgate, Dudley Knowles, Matthew Kramer, Peter Nicholson, Brian O'Connor, Bhikhu Parekh, Michael Rosen, Avital Simhony, Robert Stern, and Allen Wood.

Brooks, Thom (2005). 'Hegel's Ambiguous Contribution to Legal Theory', *Res Publica* 11: 85—94.

Brooks, Thom (2007). 'Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory', *Georgia State University Law University* 23: 513—60.

Brooks, Thom (ed.) (2009). *The Right to a Fair Trial*. Aldershot: Ashgate.

Brooks, Thom (2010). 'Punishment and British Idealism' in Jesper Ryberg and J. Angelo Corlett (eds), *Punishment and Ethics: New Perspectives*. Basingstoke: Palgrave Macmillan, pp. 16—32.

Brooks, Thom (2011). 'Is Bradley a Retributivist?' *History of Political Thought* 32: 83—95.

Brooks, Thom (ed.) (2012). *Hegel's Philosophy of Right*. Oxford: Blackwell.

Brooks, Thom (2012). 'Hegel and the Unified Theory of Punishment' in Thom Brooks (ed.), *Hegel's Philosophy of Right*. Oxford: Blackwell, pp. 105—23.

Brooks, Thom (2012). 'Natural Law Internalism' in Thom Brooks (ed.), *Hegel's Philosophy of Right*. Oxford: Blackwell, pp. 167—79.

Brooks, Thom (2012). *Punishment*. New York: Routledge.

Brooks, Thom (2012). 'James Seth on Natural Law and Legal Theory', *Collingwood and British Idealism Studies* 12:115—132.

Brooks, Thom (2013). *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2nd edition. Edinburgh: Edinburgh University Press.

Brooks, Thom (2014). 'Legal Positivism and Faith in Law', *Modern Law Review* 77: 139—47.

Brooks, Thom (2014). 'On F. H. Bradley's "Some Remarks on Punishment"', *Ethics* 125: 223—25.

Brown v. Board of Education (1954). 347 U.S. 483.

Burns, Tony (1996). *Natural Law and Political Ideology in the Philosophy of Hegel*. Aldershot: Avebury.

Cooper, David E. (1971). 'Hegel's Theory of Punishment' in Z. A. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives*. Cambridge: Cambridge University Press, pp. 151—67.

Curzon, L. B. (1996). *Jurisprudence*, 3rd ed. London: Cavendish.

del Vecchio, Giorgio (1952). *Philosophy of Law*, 8th ed. Washington, DC: Catholic University of America Press.

Dias, R. W. M. (1985). *Jurisprudence*, 5th ed. London: Butterworths.

Douzinas, Costas (2002). 'Identity, Recognition, Rights or What can Hegel Teach Us about Human Rights?' *Journal of Law and Society* 29: 379—405.

Findlay, J. N. (1958). *Hegel: A Re-examination*. London: George Allen & Unwin.

- Finnis, John (1980). *Natural Law and Natural Rights*. Oxford: Oxford University Press.
- Franco, Paul (2002). *Hegel's Philosophy of Freedom*. New Haven: Yale University Press.
- Freeman, M. D. A. (ed.) (1994). *Lloyd's Introduction to Jurisprudence*, 6th ed. London: Sweet and Maxwell.
- Fuller, Lon L. (1969). *The Morality of Law*, revised ed. New Haven: Yale University Press.
- Green, T. H. (1941). *Lectures on the Principles of Political Obligation*. London: Longmans, Green.
- Hart, H. L. A. (1994). *The Concept of Law*, 2nd edition. Oxford: Oxford University Press.
- Hegel, G. W. F. (1999). 'The German Constitution' in *Political Writings*, eds. Laurence Dickey and H. B. Nisbet. Cambridge: Cambridge University Press, 6—101.
- Hoffheimer, Michael H. (1995). 'Hegel's First Philosophy of Law'. *Tennessee Law Review* 62: 823—74.
- Inwood, Michael (1992). *A Hegel Dictionary*. Oxford: Blackwell.
- Kant, Immanuel (1996). *The Metaphysics of Morals*. Cambridge: Cambridge University Press.
- Knowles, Dudley (2002). *Hegel and the Philosophy of Right*. London: Routledge.
- Kramer, Matthew H. (2003). *In Defense of Legal Positivism: Law Without Trimmings*. Oxford: Oxford University Press.
- Paton, George Whitecross (1972). *A Textbook of Jurisprudence*, 4th ed. Oxford: Clarendon.
- Pinkard, Terry (1994). 'Constitutionalism, Politics and the Common Life' in H. Tristram Engelhardt, Jr. and Terry Pinkard (eds), *Hegel Reconsidered: Beyond Metaphysics and the Authoritarian State*. Dordrecht: Kluwer, pp. 163—86.
- Popper, Karl (2002). *The Open Society and Its Enemies, Vol. 2: Hegel and Marx*. London: Routledge.
- Primoratz, Igor (1989). *Justifying Legal Punishment*. Atlantic Highlands, NJ: Humanities Press.
- Rommen, H. A. (1964). 'In Defense of Natural Law' in Sidney Hook (ed.), *Law and Philosophy*. New York: New York University Press, pp. 105—21.
- Salter, Michael and Julia A. Shaw (1994). 'Towards a Critical Theory of Constitutional Law: Hegel's Contribution', *Journal of Law and Society* 21: 464—86.
- Seth, James (1907). *A Study of Ethical Principles*, 9th edition. Edinburgh: William Blackwood & Sons.
- Stern, Robert (1994). 'MacIntyre and Historicism' in John Horton and Susan Mendus (eds), *After MacIntyre: Critical Perspectives on the World of Alasdair MacIntyre*. Cambridge: Polity, pp. 146—60.

Stillman, Peter G. (1976). 'Hegel's Idea of Punishment', *Journal of the History of Philosophy* 14: 169—82.

Thompson, Kevin (2001). 'Institutional Normativity' in Robert R. Williams (ed.), *Beyond Liberalism and Communitarianism*. Albany: State University of New York Press, pp. 41—65.

Weinrib, Ernest J. (1996). 'Legal Formalism' in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*. Oxford: Blackwell, pp. 332—42.

Wood, Allen W. (1990). *Hegel's Ethical Thought*. Cambridge: Cambridge University Press,